

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. ENGLE

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STATE OF NEBRASKA, APPELLEE,  
V.  
REBECCA L. ENGLE, APPELLANT.

Filed May 8, 2012. No. A-11-768.

Appeal from the District Court for Otoe County: PAUL W. KORSLUND, Judge. Affirmed.  
Angela M. Minahan, of Reinsch, Slattery, Bear & Minahan, P.C., L.L.O., for appellant.  
Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Rebecca L. Engle appeals from her plea-based conviction for two counts of fraudulent acts in connection with the sale or purchase of securities (securities fraud), both Class IV felonies. Engle was sentenced to two consecutive terms of 18 to 36 months' imprisonment. On appeal, Engle asserts that the district court erred by imposing excessive sentences. She also asserts that she was denied a fair sentencing hearing due to prosecutorial misconduct and that she received ineffective assistance of counsel in connection with her sentencing. We conclude that the district court did not abuse its discretion in imposing the sentences, that Engle waived her claim of prosecutorial misconduct by failure to object or move to withdraw her pleas, and that the record is insufficient to review Engle's claim of ineffective assistance of counsel. We affirm Engle's convictions and sentences.

BACKGROUND

On December 4, 2009, the State filed an information in the district court charging Engle with eight counts of securities fraud, all Class IV felonies in violation of Neb. Rev. Stat.

§ 8-1102 (Reissue 2007). See Neb. Rev. Stat. § 8-1117 (Reissue 2007) (defining penalties for violations of Securities Act of Nebraska).

In November 2010, the parties entered into a written plea agreement in which Engle agreed to plead guilty or no contest to two counts of securities fraud. Engle also agreed to cooperate with the State in the case against her former business associate. In exchange for Engle's pleas and cooperation, the State agreed to dismiss the remaining six counts of securities fraud and not file any additional charges against Engle arising out of her actions in the offer, sale, or purchase of certain securities. The State also agreed not to use any information provided by Engle against her. There was no agreement regarding sentencing.

A plea hearing was held before the district court on May 11, 2011. Engle pled no contest to the charges of the amended information after being advised of her rights by the court. The State provided the factual basis for the charges, showing that on or about March 23 and May 13, 2005, Engle made material omissions or misstatements during the offer, sale, or purchase of securities, those being promissory notes with Royal Palm Capital Group, to certain named individuals. After considering the factual basis for the charges and finding that Engle's pleas were freely, voluntarily, knowingly, and intelligently given, the district court accepted the pleas and found Engle guilty of two counts of securities fraud. The court ordered a presentence investigation and set the matter for sentencing.

On August 16, 2011, the district court sentenced Engle to two consecutive terms of imprisonment of 18 months to 36 months. We have set forth further details of the sentencing hearing as necessary to our resolution of this appeal in the analysis section below. Engle subsequently perfected her appeal to this court.

#### ASSIGNMENTS OF ERROR

Engle asserts that (1) the district court abused its discretion by imposing excessive sentences, (2) she was denied a fair sentencing hearing due to prosecutorial misconduct, and (3) she received ineffective assistance of counsel.

#### STANDARD OF REVIEW

Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010).

#### ANALYSIS

##### *Sentences.*

Engle asserts that the district court abused its discretion by imposing excessive sentences.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Howard, supra*. When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record, and motivation for the offense, as well as the nature of the

offense and the violence involved in the commission of the crime. *Id.* In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

Engle was convicted of two counts of securities fraud in violation of § 8-1102, both Class IV felonies, punishable by a maximum of 5 years' imprisonment. See § 8-1117 and Neb. Rev. Stat. § 28-105 (Reissue 2008). Engle's consecutive sentences to imprisonment for 18 months to 36 months on each count are within statutory guidelines.

At the time of her convictions, Engle was 58 years old. She has a college education and had a career selling securities for 24 years. Engle has no prior criminal history. Based on her level of service/case management inventory interview, she was assessed at a very low risk to reoffend with a total score of 3. At the time of her interview with the probation officer, Engle described her health as poor; she was receiving disability payments as a result of Lyme disease and also suffered from fibromyalgia. The probation officer stated that based solely on the risk score, Engle would be considered an appropriate candidate for probation but observed that the court may wish to consider any aggravating circumstances deemed appropriate. While the presentence investigation report (PSR) contains various letters of recommendation on Engle's behalf, the PSR also contains victims' statements detailing the hardship imposed after losing their money through the investments at issue in this case.

The district court clearly gave careful consideration to the sentences imposed in this case. At the sentencing hearing, the court stated that it had reviewed the material in the PSR and considered the points raised by counsel in argument, noting the thoroughness of those arguments and references to the record. The court considered Engle's request for probation and all of the criteria in Neb. Rev. Stat. § 29-2260 (Reissue 2008). The court specifically found as follows:

1. Your crimes involve great risk of serious harm and they did result in enormous harm. I appreciate the efforts that you are making to try to recover from the errors and omissions policy. I think you do care about the victims. The reality as far as this Court is concerned is that the victims will likely never recover.

2. You did not act under provocation, but you embarked upon a risky course of conduct with full knowledge. Now, you say you acted with due diligence and there is evidence in the record -- [your attorney] has pointed to that -- you consulted with attorneys. There's differing opinions to that. I know [your former business associate] talked about a [particular individual] saying he didn't know if it was a good investment or bad investment. You characterize it as you got a green light from [that individual]. I'm not sure if you really acted with due diligence, but the fact remains that these were very risky investments. Your clients put their trust in you and you were putting trust in other people.

3. There are no substantial grounds excusing or justifying your crimes. You do point a finger at [your former business associate], perhaps, with some justification. He may have been more willing than you to go forward when you wanted to go to the authorities, but you had years of experience as a broker. You had invested clients' money in safe investments before. You knew what you were doing. Now, you also cite health

problems and that's a factor. I'm sympathetic to the serious situation you had with Lyme's disease, but your acts occurred over a period of time. You had time to think things over. Many letters were written, as is pointed out, and the health problems are not an excuse.

4. You're unable to compensate your victims. I understand you want to and you're doing everything you can, but the reality is that you cannot.

5. It is in your favor that you have no history of prior criminal activity, no history of regulatory actions, and you are unlikely to reoffend. I have no doubt that you would respond affirmatively to an order of probation.

6. You have cooperated extensively with investigators who spent hundreds, if not thousands, of hours in investigating this case. You did want to go to the authorities early on. You made the mistake of not following through with that, but then you did give the cooperation that [the prosecutor] pointed out.

Of course, I note the [plea] agreement in your case is substantially different than that with [your former business associate]. You stand convicted of two counts where he stands convicted of four, and I'm not party to any negotiations nor can I be, but it is obvious that the State has taken into consideration that cooperation.

You have avoided the State the time and expense of trial. You have relieved the stress of trial for victims, elderly in many instances[,] and their families, and I take that into consideration.

On the other hand, you have received the benefit of a plea agreement, and I find the agreement is entirely appropriate. I simply point out that you did benefit from that as well as the State. The bottom line here is that many people trusted you, some with their life savings, and they will suffer for the rest of their lives. Their loss is irreparable. You mislead [sic] them. You manipulated them and you betrayed that trust and the Court finds that any sentence less than imprisonment will depreciate the seriousness of your offenses and will promote disrespect for the law.

It is clear that the district court thoroughly considered all of the relevant sentencing factors in reaching its decision. On our review, we are unable to say that the district court imposed excessive sentences or abused its discretion in sentencing Engle.

#### *Prosecutorial Misconduct.*

Engle asserts that she was denied a fair sentencing hearing due to prosecutorial misconduct. Engle argues that the prosecutor failed to adhere to the plea agreement by virtue of remarks he made during the sentencing hearing.

When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003), quoting *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). See, also, *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002).

Engle asserts that the prosecutor violated paragraph 8 of the plea agreement, which provides:

Nothing which [Engle] says pursuant to this agreement may be used against her, so long as she abides by all the terms of this agreement. However, if [Engle] gives false testimony or information, or intentionally incomplete or misleading testimony, or information, or commits a serious crime or is otherwise in material noncompliance with any provision of this agreement, or rejects this agreement for any reason, the State will be relieved of any obligation it otherwise has under this agreement. If [Engle] engages in a material violation of this agreement or rejects this agreement at any time and for any reason, [Engle] shall be subject to prosecution for any federal state or local crimes which this agreement otherwise anticipated would be dismissed or not prosecuted and all testimony and information [Engle] has provided at any time may be used against her in any prosecution or proceeding.

Both the prosecutor and Engle's attorney spoke at length during the sentencing hearing. The prosecutor's remarks, which were particularly lengthy, lasted over an hour and cover more than 47 pages of the bill of exceptions. Engle asserts that the prosecutor painstakingly detailed Engle's involvement with the investment companies at issue based on what Engle had explained to him and the documents she provided pursuant to the plea agreement. Engle also asserts that the prosecutor's argument included information on counts against Engle that had been dismissed or crimes with which her former business associate had been charged. Finally, Engle notes the prosecutor's statement that "this was a massive fraud and we can't run away from that and it was ongoing and present over a number of years."

Engle does not make clear from her arguments exactly how the prosecutor's remarks at the sentencing hearing amount to using information provided by Engle against her in violation of the plea agreement. This was an extremely complex case of securities fraud, and the prosecutor's remarks about the counts with which Engle was originally charged and those of her former business associate provided a context for Engle's motivation for the offenses, as well as the nature of the offenses, to which Engle pled no contest.

The State argues that because there was no promise or agreement by the prosecutor regarding sentencing, there was no material breach of the plea agreement. The State also argues that paragraph 8 is not applicable to sentencing, but, rather, relates to the use of information provided by Engle against her in the event of a breach of the plea agreement or further criminal activity on Engle's part.

Regardless of whether the prosecutor's comments amounted to a material breach of the plea agreement, Engle has waived any error. When the State breaches a plea agreement, the defendant generally has the option of either having the agreement specifically enforced or withdrawing his or her plea. *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003). To protect his or her rights after the State has breached a plea agreement, the defendant must move to withdraw the plea, or the defendant loses the ability to withdraw the plea. *Id.* If the defendant objects to the breach of a plea agreement by the State, but fails to move to withdraw the plea, he or she is limited to seeking specific performance. *Id.* If the defendant remains silent when the State breaches a plea agreement, he or she can neither move to withdraw the plea nor seek specific performance of the agreement. *Id.* Where no objection is made at a sentencing hearing when a defendant is provided an opportunity to do so, generally, any claimed error is waived and is not preserved for appellate review. *State v. Carter*, 236 Neb. 656, 463 N.W.2d 332

(1990). Engle did not object to the prosecutor's alleged violation of the plea agreement or move to withdraw her pleas. The district court gave Engle the opportunity to make a statement at the sentencing hearing, and she declined. Engle's assignment of error is without merit.

*Ineffective Assistance of Counsel.*

Engle asserts that she received ineffective assistance of counsel. Specifically, Engle argues that her trial counsel (1) failed to allow her to speak in her own behalf during sentencing, (2) failed to object to or correct misstatements and inaccuracies in the State's sentencing argument, and (3) failed to object to the State's violation of the written plea agreement.

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). To establish a right to relief because of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Wabshaw*, 274 Neb. 394, 740 N.W.2d 583 (2007). Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id.* In an ineffective assistance of counsel claim, to prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Engle first asserts that her trial counsel instructed her not to speak during the sentencing hearing. The record is inadequate to review this claim on direct appeal.

Next, Engle asserts that there were numerous false and misleading statements made by the prosecutor at the sentencing hearing. She draws our attention to a number of alleged false or misleading statements. Given the plea-based nature of Engle's convictions, the record is inadequate for us to evaluate this claim on direct appeal.

Finally, Engle asserts that her trial counsel was ineffective for failing to object to the State's alleged violation of the written plea agreement. In *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011), the Nebraska Supreme Court considered a claim of ineffective assistance of counsel on direct appeal where there was a material breach of a plea agreement. In that case, despite the State's agreement to stand silent at sentencing, the prosecutor spoke during the sentencing hearing and violated the agreement by articulating a position with respect to sentencing. The defendant's counsel did not object to the State's breach of the plea agreement. The Nebraska Supreme Court observed that it was not clear from the record whether trial counsel's failure to object was based on trial strategy and found the record insufficient to review the claim on direct appeal.

In this case, unlike *Sidzyik*, it is not clear that there has been a breach of the plea agreement by the State. And, as noted above, any evaluation of the accuracy of the prosecutor's remarks is impossible on direct appeal due to the plea-based nature of Engle's convictions. To the extent that the prosecutor's remarks constituted a breach of the plea agreement, it is not clear from the record whether Engle's counsel did not object to the alleged breach based on trial

strategy. Accordingly, the record is not sufficient to adequately review this claim on direct appeal.

#### CONCLUSION

The district court did not impose excessive sentences or abuse its discretion in sentencing Engle. Engle's arguments in connection with her claim of prosecutorial misconduct are without merit. The record is inadequate to review Engle's claims of ineffective assistance of counsel on direct appeal.

AFFIRMED.